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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHIH-MING HSIEH, Plaintiff and Appellant, v. JENG-CHENG HO et al., Defendants and Respondents.	B182550 (Los Angeles County Super. Ct. No. BC 277555)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge and G. Keith Wisot, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

John S. Chang, for Plaintiff and Appellant.

Call, Jensen & Ferrell, John C. O'Malley, and Ward Lott, for Defendant and Respondent Dr. Jeng-Cheng Ho.

Paul, Hastings, Janofsky & Walker and Jason Frank, for Defendant and Respondent H&H Investment Co., Inc.

Shih-Ming Hsieh appeals from the judgment rejecting his claims against Jeng-Cheng Ho and awarding a multi-million dollar judgment in compensatory and punitive damages on Ho's cross-complaint against Hsieh. We affirm.

FACTS AND PROCEDURAL HISTORY

This appeal involves two families and one golf course.

Appellant Shih-Ming Hsieh is married to the older sister of respondent Jeng-Cheng Ho, making them brothers-in-law. Hsieh is an industrialist who lives in Taiwan. Ho is a dentist who lives in Southern California. The two men and their wives own H&H Investment Co., Inc. (HHI), a closely held corporation in which each couple owns 50 percent of the company's stock.

In 1991, HHI bought the Colton Golf Course for $6.5 million. The seller financed the sale by taking back a $4.5 million note at an interest rate of 9 percent. In 1994, Hsieh arranged for HHI to refinance the golf course in order to pay off the seller's note. As Hsieh's counsel later explained, Hsieh "was responsible in particular for obtaining the loans that replaced . . . the seller financing. . . . [H]is responsibility was to supervise the loan transactions and make sure they went according to plan."

Under the refinancing, Tonical Investments, Ltd., an entity Hsieh controlled, borrowed $4.5 million from BNP Paribas. Tonical paid BNP Paribas a variable interest rate on the loan ranging from 1.75 to 3 percent. Tonical then transferred the money to Hsieh's daughter-in-law, Chung Chiu Ming, who lived with Hsieh. Chung lent the money to HHI, charging HHI 9 percent interest. Ho did not know about the BNP loan and did not know it was the source of Chung's loan to HHI. Over the life of the loan, HHI paid $3 million – of which Ho contributed half – in interest-only payments to Chung.

In July 2002, Hsieh sued Ho, who was managing the golf course for the two families. Hsieh alleged Ho had spent HHI's corporate funds for his personal use, including paying himself an unauthorized salary and bonus, and using corporate funds to pay personal expenses. Hsieh alleged causes of action for an accounting, breach of

fiduciary duty, and declaratory relief. He also filed derivative causes of action in his capacity as a shareholder of HHI for defalcation and breach of fiduciary duty. Ho cross-complained against Hsieh. He alleged he had paid Tonical more than one million dollars as his half of the interest payments on Chung's loan to HHI, but Hsieh had not disclosed that he controlled Tonical and was skimming for his personal use HHI's repayments to Tonical.

In June 2003, the parties stipulated to the appointment of a referee. (Code Civ. Proc., § 638.) During discovery leading up to a multi-day trial, the referee found Hsieh engaged in multiple discovery violations. Because of the violations, the referee imposed monetary sanctions twice, and also imposed issue preclusion sanctions. (We discuss these sanctions in more detail below.)

The parties conducted a multi-day trial before the referee. At the end of the trial's first phase involving liability and damages, the referee issued a statement of decision in Ho's favor. The referee found Hsieh was not credible in much of his testimony, but Ho was. The referee observed that Hsieh failed to offer the best evidence within his control to prove his constantly shifting allegations about Ho's mismanagement of the golf course. Furthermore, Hsieh controlled the refinancing of the golf course, but could not cogently explain the transaction so as to dispel Ho's allegations of Hsieh's self-dealing at HHI's and Ho's expense. For example, Hsieh could not properly account for the disposition of Ho's $1.5 million in payments toward the loan. In addition, Hsieh had abused the trust Ho had placed in him by saddling HHI with a 9 percent loan when the funds had been available from BNP Paribas at approximately 2 percent.

The referee found Hsieh had set up the refinancing loan to benefit himself and defraud HHI and Ho, and had concealed the loan's true nature by telling Ho it was all one loan. The referee concluded Hsieh had damaged Ho by at least the amount Ho had paid toward the loan, which was $1,512,322.50. Moreover, Hsieh's breach of fiduciary duty and fraud were intentional and done with malice, entitling Ho to punitive damages.

The matter proceeded to a punitive damages phase. The referee ordered the parties to conduct discovery of Hsieh's assets and net worth. During this discovery

phase, Hsieh continued his pattern of discovery violations by not producing requested documents. Consequently, Ho asked the referee to impose issue preclusion sanctions. The referee agreed, finding Hsieh's pattern of discovery abuse was persistent. The referee found the discovery violations prevented Ho from fully evaluating Hsieh's financial condition and wealth. The referee further found that the documents Ho had obtained showed Hsieh had a net worth "well in excess" of $10 million. Finding Ho's true damages were likely much greater than the $1.5 million awarded in the trial's first phase, and concluding that a 4-to-1 ratio of punitive to compensatory damages was safely within constitutional limits, the referee imposed an issue preclusion order preventing Hsieh from offering evidence to challenge $6 million in punitive damages.

The trial court accepted the referee's findings and award. The court entered judgment for Ho, awarding him $1,512,322.50 in compensatory damages, $6,000,000 in punitive damages, and $781,211.97 in fees, costs, and prejudgment interest. This appeal followed.[1]

DISCUSSION

1. *Sufficiency of the Evidence to Support Referee's Statement of Decision*

Hsieh contends the court's judgment is invalid because substantial evidence does not support the referee's statement of decision. The statement of decision was 16 pages long. Selecting snippets and isolated sentences from it, Hsieh asserts nine sentences were factually mistaken. To support his assertion, Hsieh's opening brief contains a two-column table, the first column containing the supposedly erroneous sentences, and the second column citing evidence attempting to prove each sentence's misstatement.

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[1] The referee's rejection of Hsieh's causes of action also resulted in a judgment in favor of HHI. Hsieh does not address any of his arguments toward that portion of the judgment. In an abundance of caution, however, HHI filed a two-paragraph brief joining in all of Ho's arguments.

Hsieh's columns are unavailing because they do not weave the purported errors into a coherent narrative of how the referee's key finding – Hsieh had defrauded Ho – was mistaken. He does not explain how the referee's isolated arguable misstatements about seemingly peripheral facts in a 16 page statement of decision undermine the judgment. For example, the first mistake Hsieh cites relates to the attorney who prepared the deed of trust on the golf course. According to the statement of decision: "No other documents appear to be prepared by any attorney." Hsieh asserts the statement is wrong because that same attorney also prepared a loan commitment between Chung and HHI. That loan commitment is an unsigned draft, however, the significance of which Hsieh does not explain and, as an unsigned draft, has no obvious bearing on any material facts in this case. Instead of showing the materiality of the referee's possible factual misstatements, Hsieh simply asserts at the end of his two-column table that substantial evidence did not support the judgment. Because he offers no coherent argument supported by citations to the record and authority, we deem the contention abandoned. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

As a separate and independent ground for rejecting Hsieh's contention of insufficient evidence, we note he does not discuss all the evidence supporting the judgment. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.) Hsieh tries to justify his failure to do so by noting the referee did not find him credible. Hsieh apparently reasons that the referee's doubts about his truthfulness wiped the record clean of his testimony, and thus he need not explain it and we may not rely on it. He is mistaken. In reviewing the sufficiency of the evidence, we must consider the record as a whole. Thus, to the extent Hsieh's testimony *supports* the judgment against him, he was obligated to discuss it and we are duty bound to rely on it. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 50; *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) Hsieh is correct that we are not to credit his testimony that contradicts the judgment, but that does not mean we are to wholly disregard Hsieh's testimony as if it never existed. Just because the referee found him to be untruthful does not mean he can pretend he never testified.

2. *Substantial Evidence Supports Compensatory Damages Award*

The referee awarded Ho $1,512,322.50 in compensatory damages. According to Hsieh, the referee awarded this as the amount Ho had paid toward the loan. Hsieh contends the award was excessive because Ho had personally paid from his own funds no more than $100,000, with the balance being paid on behalf of his entire family. Hsieh's sufficiency of the evidence contention fails, however, because he does not address the following testimony by Ho: "Q. Was the 1.5 million dollars paid to BNP [Paribas] your money? . . . A. Yes." A contention of insufficiency of the evidence that does not acknowledge, let alone address, such testimony merits no further scrutiny.

3. *The Business Judgment Rule Applied to Hsieh's Claims Against Ho*

Hsieh contends the evidence proving the allegations in his complaint that Ho misappropriated HHI corporate funds for his personal use was undisputed. Thus, according to Hsieh, the referee erred in denying him relief on his claims against Ho for mismanagement and breach of fiduciary duty. Hsieh focuses in particular on Ho's alleged use of corporate funds to take a cruise; his purportedly pocketing $200 in monthly rent from the golf course's on-premise's pro-shop; his paying himself a salary and bonus without Hsieh's knowledge; and his use of HHI's corporate credit card to charge meals and buy a car.

Hsieh contends the referee misapplied the business judgment rule to reject his claims against Ho. According to Hsieh, the referee let Ho use the business judgment rule to shift to Hsieh the burden of proving Ho's expenditures were unreasonable exercises of his business judgment. Hsieh argues he should not have had the burden of proving the expenses were unreasonable; instead, according to Hsieh, Ho should have had the burden of proving they were reasonable. Hsieh asserts, "Dr. Ho should have been required, as a matter of law, to prove that his use of H&H's debit card were not for his personal use, and to prove that he was entitled to the salaries and bonuses and that they were

reasonable, and to furnish an accounting regarding items he paid for using H&H's debit card and/or money."

In Hsieh's entire discussion of the supposed impropriety of Ho's paying seemingly personal expenses from HHI's corporate coffers, Hsieh does not acknowledge the existence of, let alone discuss, the testimony of Ho's compensation expert, Gary Capata, who reviewed HHI's books and expenses. Capata found Ho's charges to HHI were appropriate business expenses for which Ho properly accounted. Assuming Hsieh is correct that Ho incurred the expenses Hsieh alleges, and further assuming Ho had the burden of proving the expenditures were reasonable business expenses, Hsieh's argument fails because he ignores the evidence of reasonableness that Ho offered. Hsieh may disagree with Capata, but he may not ignore him. Hsieh's failure to discuss the evidence supporting the referee's application of the business judgment rule therefore waives the contention.

4. *Filing Requirement for Derivative Claims*

Hsieh's complaint alleged two derivative causes of action for defalcation and for breach of fiduciary duty which he filed as a shareholder on behalf of HHI. Hsieh notes that the referee's statement of decision observed that Hsieh had not investigated Ho's management of the golf course before Hsieh sued him. Hsieh contends the referee's observation reveals the referee improperly imposed a duty of investigation as a legally unsupported element to his causes of action.

Hsieh misreads the record. The record does not suggest the referee rejected Hsieh's derivative actions because Hsieh had not investigated Ho's management before suing him. The record contains every indication that the causes of action failed for their lack of merit and Hsieh's lack of credibility. The referee's observation about no investigation was directed to finding Hsieh did not sue Ho in good faith, a precursor finding leading to the punitive damages that the referee eventually awarded. The referee thus entertained the derivative claims; he simply found them wanting.

5. *Statement of Decision's Failure to Discuss "Unclean Hands"*

Hsieh contends the judgment is void and reversible per se because the statement of decision did not address his affirmative defense of unclean hands. This defense rested on HHI's alleged misreporting of, at Ho's behest, its taxable income and interest deductions. From time to time, Chung apparently rebated to HHI the spread between the 9 percent interest HHI paid her and the smaller amount in interest that she paid Tonical. Ho directed the bookkeeper to credit the interest rebated to the stockholder loan account. Hsieh claims Ho and HHI failed to account for these rebates in HHI's tax returns and instead claimed the full interest deduction; according to Hsieh, HHI deducted about $3 million in interest payments from its taxable income, but actually paid only about $1.2 in interest.

A referee's obligation to address an issue in a statement of decision applies only to material controverted issues. (Code Civ. Proc., §§ 632, 634.) Hsieh raised unclean hands in his answer to Ho's cross-complaint, but did not thereafter pursue it. For example, he did not mention it in his closing trial brief and his opening appellant's brief contains no record citations to where in the proceedings he otherwise raised it. His reply brief cites two pages in his closing argument where he asserts he argued unclean hands as a material controverted issue, but our review of those pages defeats his assertion. In that part of his closing argument, his counsel discussed the difference in interest rates between BNP's loan to Tonical and Chung's loan to HHI and the consequent tax advantages, but he did not mention unclean hands, its elements, or how it applied. To reverse a statement of decision for failing to discuss an issue, an issue must be controverted. An issue is not controverted merely because it was mentioned in passing among multiple affirmative defenses never to be raised again until trotted out for appeal.

6. *Document 122*

The referee sanctioned Hsieh several times for discovery violations. One such sanction prohibited him from offering into evidence any documents not turned over in discovery by October 7, 2003. One of the documents the referee thereby excluded from

evidence was a 1994 letter from Ho to Hsieh that mentioned possible tax advantages of loans from non-bank foreign lenders.

Hsieh contends the referee erred in excluding the letter because none of Ho's document requests covered it. Hsieh must support his contention with citations to the record, and in particular to the document request at issue. His brief purports to quote the document request, but his brief's record citation is incorrect. The brief cites "AA7:1029-1030" as containing the document request, but pages 1029 and 1030 are not in volume 7 of the appellant's appendix, and nowhere in volume 7 is there any discovery document requesting production of documents.[2] In an abundance of caution in the event Hsieh's record citation contained a typographical error by referring to the appellant's appendix ("AA") instead of the reporter's transcript ("RT"), we reviewed the indicated page range in the reporter's transcript. Sure enough, pages 1029 and 1030 of the *reporter's transcript*, not the appellants appendix Hsieh cites, pertains to the excluded document. Those pages of the reporter's transcript contain what may, or may not, be either a quotation, or merely a paraphrase, of all, or merely a portion, of the document requests – we cannot tell from the record itself. Because we cannot compare the document request against document 122, we cannot assess Hsieh's contention that the request did not cover the document. Hsieh's failure to cite the actual document request is especially problematic because the referee found exactly the opposite of his contention. The key reason the referee decided the sanction applied against the document was "the discovery sanctions were based in considerable measure on the fact that there were declarations from [Hsieh] . . . indicating that there were no documents responsive to the categories" -- a declaration the referee implicitly found untrue. In short, Hsieh asks us to take his word over the referee's, all the while without providing us a copy of the document request at issue. We decline his invitation.

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[2] Page 1029 in volume 4 of the appellant's appendix is a blank sheet with the phrase "Exhibit K" written at the bottom, and page 1030 is a letter dated May 26, 2004, from Ho's counsel to Hsieh's.

7. *Punitive Damages*

After the referee found during the liability phase that Hsieh's misconduct justified punitive damages, the trial continued to a second phase to determine the amount of those damages. The referee ordered the parties to conduct discovery of Hsieh's net worth and financial condition. During the punitive damages discovery phase, Ho moved for issue preclusion sanctions. He requested sanctions based on Hsieh's refusal during the punitive phases to cooperate with discovery, conduct, the motion observed, consistent with Hsieh's behavior throughout the liability phase.

The referee found Hsieh was continuing his earlier established pattern of persistent discovery abuse. Hsieh's discovery violations prevented Ho from fully evaluating Hsieh's financial condition and wealth. Those documents Ho had managed to obtain showed, however, that Hsieh's net worth was "well in excess" of $10 million. Finding that a ratio of punitive to compensatory damages of 4-to-1 was well within constitutional limits against excessive fines, the referee barred Hsieh from introducing any evidence to challenge a punitive damages award of $6 million.

Hsieh contends the referee committed multiple errors in awarding punitive damages. He first contends Ho failed to request a meet-and-confer meeting before moving for sanctions. Hsieh does not cite where in the record he brought Ho's alleged oversight to the referee's attention, thus failing to preserve the issue for appeal. In addition, he cites no authority that failing to meet and confer requires reversal of a sanctions order, thereby waiving the issue on appeal by failing to support his argument with authority. And, finally, he mischaracterizes the record. During punitive damages discovery, Ho's counsel sent a letter to Hsieh's counsel complaining about the inadequacy of Hsieh's production of documents on net worth, thus apparently satisfying any obligation to meet and confer. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1016 [meet and confer can be tailored to circumstances of case, such as discussing inadequate production during deposition; no need for formal meeting].) Our review of the record found no response by Hsieh's counsel.

Hsieh also contends Ho's notice of sanctions was deficient because the notice did not indicate Ho was seeking terminating sanctions. His contention is misplaced. The referee did not terminate the case. He imposed an issue sanction. Ho's notice accurately requested what happened here: "[B]y means of this motion, Dr. Ho now seeks further sanctions, including an order establishing punitive damages against Hsieh."

Hsieh also contends an order to compel must precede a motion for sanctions. He asserts he had not been ordered to produce net worth documents, therefore the referee erred by imposing sanctions. Hsieh misrepresents the record. The referee twice ordered Hsieh to comply with discovery on punitive damages. The statement of decision reveals that "At a telephonic hearing regarding phase two of the trial before the referee on February 25, 2004, the parties discussed the need for taking further discovery in this action regarding Hsieh's net worth in order to proceed with the punitive damages phase of the trial . . . . The referee ordered Dr. Ho to propound further document requests to Hsieh regarding punitive damages issues . . . and Hsieh to respond." And in reference to a second order by the referee, the statement of decision reveals "[O]n April 5, the referee confirmed its prior order that Hsieh submit to a deposition regarding his wealth relevant to punitive damages . . . ."

Finally, Hsieh contends in two respects that substantial evidence did not support the award, thus violating due process. First, he argues the amount was excessive because his conduct was not sufficiently reprehensible. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419; *Shore v. Gurnett* (2004) 122 Cal.App.4th 166, 173-174.) He additionally argues it was excessive because there was insufficient evidence to support the referee's finding that his wealth far exceeded $10 million.

In support, Hsieh notes his conduct did not harm Ho physically, and he showed no reckless indifference to health or safety. Further, his conduct, in his view, involved a single transaction, not a repeated course of conduct. Also, Ho was not an especially vulnerable victim. And finally, the documents he provided to Ho relating to his net worth were in Chinese and Ho did not provide English translations to the referee, inviting Hsieh

to ask rhetorically how the referee could have concluded anything about Hsieh's net worth.

Hsieh's contention fails because he does not discuss evidence that supported the damages award. For example, he does not discuss the reprehensibility of his defrauding a family member who was vulnerable because cultural dictates obligated Ho to defer to Hsieh as his elder. He also ignores the evidence of his considerable net worth, which included almost two dozen pieces of real estate, income from 13 corporations with which he is affiliated, stock in several companies, and an art collection.

8. *Reference Constitutional*

The trial court referred the matter to a referee. (Code Civ. Proc., § 638.) Counsel for both parties signed a stipulation agreeing to the reference. Indeed, Hsieh's attorney prepared the stipulation. Hsieh nevertheless asserts the reference was void because he did not provide his personal, written consent. In support, he cites case law that the client must personally approve an agreement to arbitrate and a settlement. He cites no authority however, that such a requirement exists for a reference. Indeed, *In re Doran's Estate* (1956) 138 Cal.App.2d 541, 545 held to the contrary by establishing that an attorney may bind a client to a reference. Moreover, Hsieh first objected to the reference in July 2004 after the liability and damages phase had ended and the referee had found against him. By participating in the reference, we deem him to have given his consent. (*Estate of Johnston* (1970) 12 Cal.App.3d 855, 859 [parties participation in reference proceedings "established their prior consent to the court's reference, or at least a waiver of any objections thereto."].)

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

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RUBIN, ACTING P. J.

We concur:

BOLAND, J.

FLIER, J.